

Securities Regulation

Issue

Since the Supreme Court of Canada ruled that the Federal Government does not have the jurisdiction to implement a National Securities Regulator, vast opportunity has emerged for implementation of an inclusive and harmonized passport system of securities regulation that includes all provinces and territories.

Background

On December 22, 2011 the Supreme Court of Canada released its unanimous decision in the Federal Government's reference on the constitutionality of the proposed legislation to create a National Securities Regulator. The legislation was found to be in pith and substance legislation relating to "property and civil rights" and therefore ultra vires the federal Government's powers.

While ruling that the proposed legislation was not constitutional, the Supreme Court of Canada did not completely close the door to a role for the Federal Government in a cooperative scheme of securities regulation. The Court stated:

[130] While the proposed Act must be found ultra vires Parliament's general trade and commerce power, a cooperative approach that permits a scheme that recognizes the essentially provincial nature of securities regulation while allowing Parliament to deal with genuinely national concerns remains available.

[131] The various proposals advanced over the years to develop a new model for regulating securities in Canada suggest that this matter possesses both central and local aspects. The same insight can be gleaned from the experience of other federations, even if each country has its own constitutional history and imperatives. The common ground that emerges is that each level of government has jurisdiction over some aspects of the regulation of securities and each can work in collaboration with the other to carry out its responsibilities.

[132] It is not for the Court to suggest to the governments of Canada and the provinces the way forward by, in effect, conferring in advance an opinion on the constitutionality on this or that alternative scheme. Yet we may appropriately note the growing practice of resolving the complex governance problems that arise in federations, not by the bare logic of either/or, but by seeking cooperative solutions that meet the needs of the country as a whole as well as its constituent parts.

[133] Such an approach is supported by the Canadian constitutional principles and by the practice adopted by the federal and provincial governments in other fields of activities. The backbone of these schemes is the respect that each level of government has for each other's own sphere of jurisdiction. Cooperation is the animating force. The federalism principle upon which Canada's constitutional framework rests demands nothing less.

Following the decision, former Federal Finance Minister Jim Flaherty stated his desire to make arrangements with the provinces to proceed with a Canadian securities regulator to deal with those

aspects of the securities market that are interprovincial and global. Mr. Flaherty also stated it was clear in the Supreme Court of Canada judgment that the day-to-day regulation of securities will remain with the provinces.

As the Supreme Court of Canada recognized:

[42] Since 2008, all provincial and territorial jurisdictions except Ontario participate in a “passport regime” based on harmonized rules that allow issuers and market intermediaries to engage in activities in multiple jurisdictions while dealing with a single principal regulator.

The passport model has been a confidence-building step towards a complete and expanded fully national version of the system. Previous arguments to the Wise Persons’ Committee that reviewed the issue still hold true: *“Local securities regulators tend to be well attuned to the strengths, weaknesses, needs and resources of their local capital markets and local market participants (issuers, investors and intermediaries). Just as our economy exhibits strong regional characteristics, with certain industrial or economic sectors being particularly prominent in some provinces and territories and much less so in others, so our securities commissions have developed strong and complementary local expertise.*

The reformulation and harmonization of policy instruments, a process now well advanced, has considerably diminished differences in the legal framework between jurisdictions”

Given the Supreme Court of Canada’s rejection of the proposed National Securities Regulator, a renewed effort should be made to bring Ontario into the Passport System and to continue to harmonize provincial regulation through National Instruments developed in that system. The Passport System should be the model for harmonization of Canada’s securities regulatory regime into a coordinated national system.

Sound and effective securities regulation is critical to fostering investor confidence and attracting capital. Access must be as cost effective and convenient as possible while providing an exemplary level of investor protection. To date, the passport system appears to be effective in achieving these goals for participating provinces and territories.

The Alberta Chambers of Chamber of Commerce recommends that the Government of Canada:

1. Work with the provinces and territories to maintain and support the Passport Agreement, build on securities passport improvements that have already been made by participating provinces and territories, and move towards national harmonization by way of a well-designed, well monitored, nation-wide passport system for securities regulation that includes all provinces and territories.

The Alberta Chambers of Chamber of Commerce recommends that the Government of Alberta and the Governments of all Provinces:

2. Cooperate with the federal government to provide a role for the federal government in the enforcement of securities regulation and in other areas of federal jurisdiction, in order to enhance the functionality of a nation-wide passport system.